QUESTION PRESENTED

Whether § 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), which prohibits statements of alcohol content on malt beverage labels, violates the First Amendment.

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No. 93-1631
IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL.

Petitioners,

v.

COORS BREWING CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF THE WINE INSTITUTE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Wine Institute is an association of California vintners. Its members include 400 California wineries and affiliated businesses, representing approximately three-fourths of the total wine production in the United States.

The Wine Institute is dedicated to enhancing the environment for the responsible enjoyment of wine. In support of that mission, the Institute encourages the moderate consumption of wine as a mealtime beverage.

The parties have consented to the filing of this brief. Their letters to that effect have been filed separately in this Court.

SUMMARY OF ARGUMENT

The government has claimed an "added presumption of validity" for the suppression of commercial speech relating to alcohol. Pet. Brief at 17, 37-38. That claim contradicts the analysis prescribed by the precedents of this Court. It also threatens to prejudge an important question of constitutional law not raised on these facts -- namely, whether and to what extent the government may prohibit scientifically supported statements on the health benefits of moderate drinking.

That alcohol abuse is unhealthy has long been understood. Only recently has it become clear that moderate consumption of alcohol is actually beneficial to health. In particular, moderate alcohol intake is associated with sharply reduced risk of coronary heart disease, leading to increased life expectancy.

Most of the data linking moderate alcohol consumption to good health are generic to alcohol, whether consumed as wine, beer, or distilled spirits. Some studies, however, have found particular benefit in wine. Research shows that wine, especially red wine, contains complex chemicals, known as phenols or flavonoids, that act as antioxidants. By preventing the oxidation of low-density lipoprotein (LDL) cholesterol, antioxidants may block the formation of unhealthy plaque on artery walls, thus lowering the risk of coronary heart disease and stroke.

Federal regulations do not allow such benefits to be mentioned in alcohol beverage labeling and advertising. Health claims are barred regardless of their accuracy, and the Bureau of Alcohol, Tobacco and Firearms (ATF) has taken, in its own words, "a very strict view" of the prohibition. ATF, Industry Circular 93-8 (Aug. 2, 1993). Indeed, until recently, the ATF even barred the wine industry from reprinting and distributing medical journal articles discussing the health benefits of its product. Letter of William T. Drake, Associate Director of Compliance Operations, to John DeLuca, President of the Wine Institute, Nov. 30, 1988.

In 1993 the ATF signalled its willingness to relax -- or at least to rethink -- its strict stance against health claims for moderate alcohol consumption. Noting that it had received many inquiries on statements regarding the health benefits of moderate drinking, the agency announced its decision to engage in rule-making "to develop more concrete guidelines" on the subject. ATF, Industry Circular 93-8 (Aug. 2, 1993). The possibility of liberalization suggested by this announcement remains only a possibility, as rule-making proceedings have not yet begun. Moreover, there is no assurance that a liberalized policy on the part of the ATF would not be contradicted by Food and Drug Administration (FDA), which has acknowledged authority to regulate health claims on food labels and which has threatened to regulate alcohol beverages as drugs if health claims are made for them. *Id.* At this time, all that can be said with confidence is that the situation is in flux.

The growing scientific evidence in favor of moderate consumption of alcohol is on a collision course with the highly restrictive federal policy on health claims. It may be that conflict can be avoided by regulatory flexibility. The California wine industry hopes for that solution and pledges to work with federal regulatory authorities in a cooperative

spirit. On the other hand, the conflict may lead to litigation. In that event, the courts, and eventually this Court, will have to decide whether and to what extent legal restrictions on scientifically supported health claims for alcohol beverages are consistent with the First Amendment.

For the present, the crucial point is that this important issue not be inadvertently prejudged. This Court should avoid any statements implying unlimited federal regulatory authority over alcohol beverage labeling and advertising. In particular, the Court should reject the Solicitor General's claim that the federal regulation of alcohol beverage labeling and advertising is entitled to "an added presumption of validity, over and above the presumption of constitutionality normally accorded an Act of Congress." Pet. Brief at 17, 37-38. Loose talk of an "added presumption of validity" for alcohol regulation is illogical, unwise, and inconsistent with this Court's precedents on commercial speech. Acceptance of that claim would prejudge the important constitutional question -- not presented here -- whether and to what extent the government can regulate scientifically supported statements on the health benefits of moderate drinking.

ARGUMENT

I. SUPPRESSION OF SCIENTIFICALLY SUPPORTED STATEMENTS ON THE HEALTH BENEFITS OF MODERATE DRINKING RAISES A SUBSTANTIAL FIRST AMENDMENT QUESTION.

As is explained more fully below, the government's claim of an "added presumption of validity" amounts to a bid for carte blanche approval of any regulation of commercial speech regarding alcohol. This claim sweeps far too broadly.

Its approval would effectively prejudge an important issue of constitutional law not now before the Court -- namely, whether and to what extent the government can forbid truthful and informational statements about the health benefits of alcohol.

There is a wealth of scientific data on the health benefits of alcohol. Researchers from the Harvard Medical School recently analyzed some 200 studies and concluded that moderate alcohol consumption is associated with a 25 to 45 percent reduction in the risk of coronary heart disease. JoAnn E. Mason, et al., *The Primary Prevention of Myocardial Infarction*, 326 New England Journal of Medicine 1406-16 (1992). A 1993 study reports that persons who have one or two drinks a day cut their risk of heart attack in half. J. Michael Gaziano, et al., *Moderate Alcohol Intake, Increased Levels of High-Density Lipoprotein and its Subfractions, and Decreased Risk of Myocardial Infarction*, 329 New England Journal of Medicine 1829-34 (1993). There is also evidence that the risk of stroke for lifelong abstainers is more than twice that for moderate drinkers. Helen Rodgers et al., *Alcohol and Stroke: A Case-Control Study of Drinking Habits Past and Present*, 24 Stroke 1473-77 (1993). Perhaps most impressive of all is an analysis of the U.S. government's massive National Health and Nutrition Examination Survey, the largest study of its kind, showing that "moderate drinking increases time until death from any cause by about 3%." Douglas Coate, *Moderate Drinking and Coronary Heart Disease Mortality: Evidence from NHANES I and NHANES I Follow-Up*, 83 American Journal of Public Health 888-90 (1993).

Such references could be multiplied many times over. Even the National Institute on Alcohol Abuse and Alcoholism (NIAAA), which traditionally has been rigidly anti-alcohol, has now recognized the "considerable body of evidence that

lower levels of drinking decrease the risk of death from coronary artery disease." NIAAA, *Alcohol Alert* 2 (Apr. 1992).

Additionally, there is evidence suggesting that wine, especially red wine, may have health benefits not shared by other alcohol beverages. Red wine is rich in chemicals known as phenols or flavonoids. These complex compounds, which give wine its subtle characteristics of taste and smell, also work as antioxidants. Antioxidants may inhibit the oxidation of LDL cholesterol, and over a prolonged period of consumption, may inhibit the formation of fatty deposits on artery walls. Although much work remains to be done in this area, the studies are highly suggestive. See, e.g., E.N. Frankel et al., *Inhibition of Oxidation of Human Low-Density Lipoprotein by Phenolic Substances in Red Wine*, 341 The Lancet 454-57 (1993); E.N. Frankel et al., *Inhibition of Human LDL Oxidation by Resvertrol*, 341 The Lancet 1103-04 (1993). Significantly, the "Traditional Healthy Mediterranean Diet," recently released by the Harvard School of Public Health (in collaboration with the Oldways Preservation and Exchange Trust and the World Health Organization) recognizes moderate wine consumption as an ingredient in the dietary road to good health.

Despite the accumulating evidence of the health benefits of alcohol beverages generally and wine in particular, the Bureau of Alcohol, Tobacco and Firearms (ATF) maintains a virtual ban on health claims in wine labeling and advertising. Facially, the ATF regulations seem entirely reasonable. They prohibit any representation of therapeutic effect that "tends to create a misleading impression." 27 C.F.R. §§ 4.39(h) and 4.64(i). But the ATF has taken, in its own words, "a very strict view" of the prohibition. ATF, Industry Circular 93-8 (Aug. 2, 1993). As interpreted by the ATF, the regulation bars any statement mentioning the health

benefits of moderate consumption of alcohol, "*even if backed up by medical evidence*" (emphasis added), if such statement "is not properly qualified, does not give all sides of the issue, and does not outline the categories of individuals for whom any such positive effect would be outweighed by numerous negative health effects." ATF, Industry Circular 93-8 (Aug. 2, 1993). No statement of a length suitable for labeling or advertising could possibly meet these requirements. The effect is to convert a gentle-sounding ban on misleading representations to a categorical prohibition of scientifically supported health claims in alcohol labeling and advertising.*

Today, there are some signs that ATF's virtual ban on truthful and informational health claims in alcohol labeling and advertising may be relaxed or redefined. In 1993, ATF reiterated that the dissemination of scientific information "for the purpose of inducing sales" would be illegal, but took the welcome step of clarifying that "the mere transmittal of a scientific or medical article to a newspaper journalist for the purpose of showing both sides of a public issue ... " would no longer be considered a violation of federal law. Letter of William T. Earle, Chief, Industry Compliance Division, to John DeLuca, President of the Wine Institute, Sept. 8, 1993. Additionally, as noted, ATF has announced the intention of engaging in rule-making proceedings "to develop more concrete guidelines with respect to health claims in the labeling and advertising of alcoholic beverages." ATF, Industry Circular 93-8 (Aug. 2, 1993).

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*ATF has approved advertising materials that include the full text of April 1992 edition of *Alcohol Alert*, in which the NIAAA for the first time acknowledged the psychological and physiological benefits of moderate drinking. As that text runs to four single-spaced pages, however, it is difficult to conceive of any practical use of it in advertising or labeling.

Rethinking the government's policy in this area has been encouraged by the United States Congress, which recently has prodded federal agencies to investigate the health benefits of alcohol consumption. This year the Senate Committee on Appropriations urged the National Institutes of Health "to support and assist research efforts in these areas, especially the impact of alcohol on cardiovascular health and longevity and on the dietary role of antioxidants and moderate alcohol consumption, and to develop a working strategy to assure future research on this important issue." S. Rep. No. 103-318, 103d Cong., 2d Sess., p. 117 (1994). Identical language was been used by the House Appropriations Committee to the Department of Agriculture. See H.R. Rep. No. 103-542, 103d Cong., 2d Sess., p. 20 (1994). See also H.R. Rep. 103-553, 103d Cong., 2d Sess., pp. 47-48 (1994) (addressing the National Heart, Lung, and Blood Institute).

Despite these admonitions, the Food and Drug Administration (FDA) has signalled that it may wish to maintain a very strict ban against labeling and advertising that notes the health benefits of moderate alcohol consumption, even if ATF does not. Not only does FDA have independent authority to regulate health claims on food products, but it has threatened to regulate alcohol beverages as drugs if curative, therapeutic, or disease prevention claims are made for them. See ATF, Industry Circular 93-8 (Aug. 2, 1993).

Thus, it is most unclear whether and to what extent the federal ban on statements regarding the health benefits of moderate alcohol consumption will be relaxed. In the face of overwhelming evidence that important health benefits do exist, the ATF may choose to modify its restrictive policy -- or it may not. It may choose to recognize the industry's legitimate interest in disseminating truthful, scientifically supported, and highly relevant health information to

consumers who can use it -- or it may not. And ATF's revised policy (whatever it may prove to be) may be undermined by new regulations imposed by the FDA -- or it may not.

In these circumstances, no one can say with confidence whether a conflict will develop between the First Amendment rights of alcohol beverage producers and consumers and the government's restrictive policy on labeling and advertising of health claims, or whether any such conflict will lead to litigation. If it does lead to litigation, the federal courts will be faced with a novel and difficult question of constitutional law, the exact contours of which cannot now be foreseen.

II. THE GOVERNMENT'S CLAIM OF AN "ADDED PRESUMPTION OF VALIDITY" FOR REGULATION OF ALCOHOL LABELING AND ADVERTISING IS ILLOGICAL, UNWISE, AND CONTRARY TO THE PRECEDENTS OF THIS COURT.

The Wine Institute, on behalf of the California wine industry, does not ask this Court to resolve the question of constitutional protection for scientifically supported statements on the health benefits of moderate drinking. On the contrary, the Wine Institute respectfully asks the Court *not* to resolve this issue -- at least not until such time as the considerations on both sides have been developed through the normal processes of litigation.

There is real danger that the question of constitutional protection for scientifically supported health claims may be inadvertently prejudged by the decision in this case. The Solicitor General creates that risk by claiming that government regulation of alcohol labeling and advertising is entitled to an "added presumption of validity, over and above

the presumption of constitutionality normally accorded an Act of Congress ... ." Pet. Brief at 17. Regardless of how the instant case is resolved, this argument should be rejected. It is illogical, unwise, and inconsistent with a proper understanding of this Court's precedents on commercial speech.

The idea of an added presumption of validity for suppression of commercial speech relating to alcohol is illogical, because it counts the government's interest twice. Under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the government interest in regulating commercial speech must be "substantial." *Id.* at 566. No one doubts that the regulation of "socially harmful activity" (Pet. Brief at 38-41) is a substantial state interest. And no one doubts that alcohol abuse is a socially harmful activity. (Presumably, every activity that the government seeks to regulate is socially harmful, or there would be no point in regulation.) It therefore follows that the government has, as *Central Hudson* requires, a "substantial" interest in regulating labeling and advertising that would promote alcohol abuse.

But the government claims an *added* presumption of validity for the regulation of speech promoting socially harmful activity. Logically, that counts the government's interest in inhibiting socially harmful activity twice -- once to create the "substantial" government interest required by *Central Hudson* and again to support the "added" presumption of validity claimed by the Solicitor General. The effect of this double-counting is to make the existence of a socially harmful activity (which presumably will appear in every case) an independently sufficient basis for suppressing commercial speech. It is a fancy way of saying that a substantial interest is *all* that the government need show to

sustain its regulation. As an interpretation of *Central Hudson*, that reasoning is plainly illogical.

More importantly, it is unwise. As has been noted, there is ample evidence of the health benefits of moderate alcohol consumption, especially of wine. As the scientific research becomes more conclusive, the potential conflict between the First Amendment rights of wine producers and consumers and the highly restrictive government policy on health claims becomes more acute. The Court should address this conflict only if and when it becomes necessary to do so and only on the basis of a fully developed factual record. It should not prejudge the issue by endorsing the government's request for carte blanche approval of anything it might choose to do in regulating commercial speech regarding alcohol.

Finally, the suggestion of an added presumption of validity is inconsistent with a proper understanding of this Court's precedents. The government's argument is based chiefly on *California v. LaRue*, 409 U.S. 109 (1972), where the Court referred to an "added presumption" of the validity of state laws prohibiting nude dancing in establishments licensed to sell liquor. That presumption was said to come from the Twenty-first Amendment, which makes state law paramount in the regulation of alcohol beverages.

There was, from the outset, something odd about this idea. The Twenty-first Amendment does indeed create an added presumption of the validity of state law as against the federal commerce power. On that much, history is clear. See *Craig v. Boren*, 429 U.S. 190, 205-06 (1976) (and cases cited therein). But the notion that the Twenty-first Amendment created an added presumption of the validity of state law as against civil liberties, is rather plainly unfounded. Nothing in that provision's language or origins

suggests that it was intended to curtail rights guaranteed elsewhere in the Constitution. See Paul Brest, *Processes of Constitutional Decisionmaking, Cases and Materials* 258 (1975) ("Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights ... .")

Moreover, the precedents on the effect of the Twenty-first Amendment on civil liberties are strangely mixed. On the one side are *LaRue* and its progeny, *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam). On the other side are several decisions ruling that the Twenty-first Amendment does not affect civil liberties. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The apparent inconsistency is resolved by attention to context. *LaRue* and its progeny involved nude dancing. As this Court has subsequently had occasion to clarify, nude dancing is, in terms of the First Amendment, low-value speech. As Chief Justice Rehnquist said in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 561 (1991), nude dancing is "only marginally" within the "outer perimeters" of the First Amendment. *Id.* at 566. Moreover, *LaRue* and its progeny involved laws prohibiting nude dancing only in establishments licensed to serve liquor. As *Barnes* demonstrates, the prohibitions could be upheld under the general police power without reference to the Twenty-first Amendment. The "added presumption" language of *LaRue* was, therefore, entirely unnecessary. At most, it stands for something far narrower and more context-specific than the broad principle urged by the government.

Moreover, the government's claim of an added presumption of validity for government regulation of alcohol

labeling and advertising directly conflicts with this Court's precedents on commercial speech. The controlling case is *Central Hudson*, which states the four-part test for government regulation of commercial speech: (1) the speech must be lawful and not misleading; (2) the government interest must be substantial; and the regulation must (3) directly advance that interest and (4) not be more extensive than necessary. 447 U.S. at 556.

The government's claim of an added presumption of validity for laws regulating alcohol labeling and advertising would pull the teeth of *Central Hudson*. As careful analysis shows, the effect would be to eliminate the third and fourth requirements, thus relieving the government of the obligation to show *any* means-ends fit in regulating commercial speech.

With respect to the first requirement (lawful and not misleading), the added presumption is simply not relevant. Speech that does not have these characteristics can be suppressed -- period. With respect to the second requirement (substantial interest), the added presumption adds nothing. Either the government's interest is substantial -- in which case that part of the test is satisfied and nothing additional need be said -- or it is not substantial -- in which case no added presumption of validity could possibly arise. It is with respect to the third and fourth requirements (directly advance and not more extensive than necessary) that an added presumption of validity would operate. It would dispense with the third and fourth requirements, or at least reduce them to formalities. The proof of a substantial interest would become an independently sufficient basis for suppressing commercial speech, without regard to the means-ends requirements that the *Central Hudson* opinion so painstakingly set forth.

In short, the government's claim of an added presumption of validity would gut *Central Hudson*'s detailed four-part test and replace it with carte blanche approval of government regulation whenever alcohol is involved. That approach sweeps much too broadly. It is a quick-triggered solution to a broad range of problems not now before the Court, specifically those involving the heath benefits of moderate drinking, and it fundamentally contradicts this Court's careful attention to the First Amendment values of truthful and informational commercial speech.

CONCLUSION

The question before the Court is a narrow one and should be narrowly resolved. It should not become the occasion for a blanket "added presumption of validity" that would effectively prejudge the merits of difficult constitutional questions not now before the Court.

Respectfully submitted,

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